IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1057

ESTATE OF SALLYE LIBSCOMB FRENCH
JOHN W. KEY, *et al.*,

Appellants,

v.

MICHAEL M. DOYLE, *et al.*,

Appellees.

ON APPEAL FROM THE DISTRICT OF COLUMBIA
COURT OF APPEALS

BRIEF FOR APPELLEE CALVARY BAPTIST CHURCH

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PRIOR OPINIONS

The opinion and order of the Superior Court of the District of Columbia dated February 13, 1975, is unreported but appears in the Record (Juris. State. App. B, pp. 1b-9b).

The opinion of the District of Columbia Court of Appeals dated November 1, 1976, is reported at 365 A.2d 621, and appears in the Record (Juris. State. App. A, pp. 1a-11a).

JURISDICTION

Jurisdiction of this Court is alleged by the appellants to rest on 28 U.S.C. §1257(1).

Appellee Calvary Baptist Church on February 18, 1977, moved the Court to dismiss the appeal herein on the grounds that the Court has no jurisdiction over the appeal under 28 U.S.C. §1257(1) on the ground that §18-302 of the District of Columbia Code, the statute involved, is a local District of Columbia statute and not a "statute of the United States" as required by 28 U.S.C. §1257(1). The Court, on March 21, 1977, entered an order that "Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits."

Pursuant to Rule 16(6) of the Rules of this Court, appellee Calvary Baptist Church renews its motion to dismiss the appeal herein on the ground that the Court has no jurisdiction over the appeal under 28 U.S.C. §1257(1). As grounds for this motion, the Court's attention is respectfully directed to the argument set forth on pages 3-5 of the Motion to Dismiss or Affirm filed in this Court on February 18, 1977. As further reason for dismissal of this appeal, the Court's attention is called to the failure on the part of the appellants to comply with Rule 16(6), of the Rules of this Court which requires counsel to address themselves at the outset of their briefs to the question of jurisdiction when consideration of jurisdiction is postponed. Accordingly, appellants have failed to meet

the burden of showing that the jurisdiction by appeal was properly invoked. See: *Sweezy v. New Hampshire* (1957), 354 U.S. 234, 236; *Raley v. Ohio* (1959), 360 U.S. 423, 435; *Slagle v. Ohio* (1961), 366 U.S. 259, 264.

STATUTE INVOLVED

Title 18 §302, District of Columbia Code

> A devise or bequest of real or personal property to a minister, priest, rabbi, public teacher, or preacher of the gospel, as such, or to a religious sect, order, or denomination, or to or for the support, use, or benefit thereof, or in trust therefor, is not valid unless it is made at least 30 days before the death of the testator.

QUESTIONS PRESENTED

1. Is Title 18 §302 of the District of Columbia Code invalid as constituting an unconstitutional infringement of the free exercise of religion provisions of the First Amendment to the Constitution?

2. Is Title 18 §302 of the District of Columbia Code unconstitutional under the establishment clause of the First Amendment to the Constitution?

3. Whether the Courts below correctly held that Title 18 §302 of the District of Columbia Code is invalid as constituting a deprivation of due process of law guaranteed by the Fifth Amendment to the Constitution.

STATEMENT OF THE CASE

Sallye Lipscomb French executed a will on October 13, 1972, in which she left one-third of her residuary estate

to appellee Calvary Baptist Church and one-third to appellee St. Matthew's Cathedral. She died on November 2, 1972, less than 30 days after the execution of the will. Mrs. French had executed two previous wills in 1960 and 1963 in which she had made several religious bequests to both Baptist and Catholic organizations. There is no evidence that appellees had made any attempts to influence her choice of legatees. (Juris. State. App. A, p. 2a).

The Executor of the Estate of Sallye Lipscomb French instituted this action for instructions when the Finance Office of the District of Columbia refused to issue a tax certificate showing that the District of Columbia inheritance tax had been discharged. (App. pp. 5-10) The reason for the refusal of the Finance Office to issue the tax certificate was its contention that any distributuion to appellees Calvary Baptist Church and St. Matthew's Cathedral would be in violation of Title 18 §302 of the District of Columbia Code. Appellees answered the complaint and asserted the unconstitutionality of Title 18 §302 of the District of Columbia Code. The District of Columbia and the heirs-at-law, appellants herein, on the other hand, answered the complaint and asserted the validity of the statute and maintained that the residuary estate should be distributed intestate without regard to the residuary legacies bequeathed to the appellees. The parties filed cross motions for summary judgment based upon stipulated facts to which there was no genuine issue. (App. pp. 11-16) After a hearing on the motion for summary judgment, on February 13, 1975, the Superior Court of the District of Columbia granted the motion for summary judgment to Calvary Baptist Church and St. Matthew's Cathedral. (Juris. State. App. B, pp. 1b-9b). The District of Columbia did not appeal from the opinion and order of the Superior Court of the District of Columbia of February 13, 1975; only the appellants, heirs-at-law, appealed.

The District of Columbia Court of Appeals, after hearing, on November 1, 1976, affirmed the decision of the Superior Court of the District of Columbia and issued its opinion that Title 18 §302 was unconstitutional and violated the due process clause of the Fifth Amendment to the Constitution. (Juris. State. App. A, pp. 1a-11a)

On January 26, 1977, appellants filed notice of appeal to this Court from the judgment of the District of Columbia Court of Appeals of November 1, 1976. Appellants filed a jurisdictional statement in this Court on January 31, 1977; and appellee Calvary Baptist Church filed Motion to Dismiss or Affirm on February 18, 1977. On March 21, 1977, the Court entered an order postponing the question of jurisdiction to the hearing of the case on the merits. (App. p. 2)

ARGUMENT

I

TITLE 18 §302 OF THE DISTRICT OF COLUMBIA CODE IS INVALID AS CONSTITUTING AN UNCONSTITUTIONAL INFRINGEMENT OF THE FREE EXERCISE OF RELIGION PROVISIONS OF THE FIRST AMENDMENT TO THE CONSTITUION.

The free exercise clause of the First Amendment prohibits Congress from making any law interfering with the free exercise of religion. This prohibition protects religious organizations[1] as well as individuals and has been interpreted by this Court as denying to government any power to prescribe, regulate or favor, either directly or indirectly, any particular religious belief or doctrine.

Although the First Amendment is stated in language of absolute prohibition, the government, nevertheless, has inherent police power to regulate religious activities in a reasonable and nondiscriminatory manner, in order to protect the safety, peace, and good order of all members of society, *Cantwell v. Connecticut* (1940), 310 U.S. 296; *Jamison v. Texas* (1943), 318 U.S. 413. However, the government may not by law or regulation infringe on the free exercise of religion unless there is a compelling public need. Where there exists a compelling public need, it may only be accomplished by not more than the least restriction necessary. First Amendment rights may

[1] The appellants question whether the exercise clause gives any "rights" to religions, at page 8 of their brief. In *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church* (1952), 344 U.S. 94, it was pointed out that the free exercise clause extends to religious organizations the same right to be free from governmental coercion as is extended to individuals.

not be infringed, as opposed to being merely regulated, simply because the legislature may have a "rational basis" for adopting such restriction, for freedom of worship may not be infringed on such slender grounds. *West Virginia State Board of Education v. Barnette* (1943), 319 U.S. 624. In *Sherbert v. Verner* (1963) 374 U.S. 398, it was held that there must be some compelling state interest to justify any substantial infringement of a person's First Amendment rights. There the Court said:

> "* * *It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation,' Thomas v. Collins, 323 US 516, 530 * * * "

Clearly, there is no compelling state need for the infringement provided for by Title 18 §302. This is illustrated by the fact that only seven other states have statutes designed to alleviate the purported evil of the "deathbed" influence, and none of these statutes discriminate solely against religion but rather restrict substantially all charitable bequests.[2] In addition, the other seven statutes are aimed at preserving the rights of descendants of the testator, the D.C. statute being the only one which can operate for the benefit of the state government (bequests invalidated by Title 18 §302 would escheat to the District of Columbia if the testator had no living heirs. See Title 19 §701, District of Columbia Code.) The

[2] *See* 41 Fla. Stat. Section 731.19; 113 Ga. Code Ann. Section 107; 14 Idaho Code Section 326; Iowa Code Section 633.266; Miss. Code Ann. Section 91-5-31; 91 Mont. Rev. Code Section 142; Ohio Code Ann. Section 2107.06. The Pennsylvania statute, 20 P.S. §180.7(1) was declared invalid in *In Re Estate of Cavill* (1974); 459 Pa. 428, 329 A.2d 503, and *In re Estate of Riley* (1974), 459 Pa. 428, 329 A.2d 511, cert. denied 421 U.S. 971, see discussion p. 17.

D.C. statute goes far beyond the least restriction necessary.[3] The appellants here have failed to demonstrate that no alternative forms of regulation would suffice to "protect" against the purported evil of deathbed bequests without infringing First Amendment rights. See *Sherbert v. Verner, supra; Shelton v. Tucker* (1960), 364 U.S. 479, 488.

This statute was declared invalid and unconstitutional on First Amendment grounds by Judge Gesell of the United States District Court for the District of Columbia in *In re Small*, 100 Wash. L. Rptr. 453 (D.D.C. Feb. 7, 1972), a copy of which is set forth in the Appendix to this Brief.

Title 18 §302 in requiring a testator to live at least 30 days from the date of executing a will as a condition to a valid bequest to a religious organization is an impermissible infringement of the free exercise clause of the First Amendment. Any restrictions on the free exercise of religion "have invariably posed some substantial threat to public safety, peace or order." *Sherbert v. Verner, supra.* In his concurring opinion in *Martin v. Struthers* (1943), 319 U.S. 141, 149, Mr. Justice Murphy stated:

> "I believe that nothing enjoys a higher state in our society than the right given by the First and Fourteenth Amendments freely to practice and proclaim one's religious convictions. * * *"

To deny the testator the right to give or bequeath and the appellee churches the right to receive the bequest in the circumstances of this case is to prohibit the free exercise of religion.

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[3] The Superior Court opinion suggests that there is no reason why the legitimate interest of the state could not be served by creating a rebuttable presumption of undue influence with respect to a legacy to a religious entity within a statutory period. (Juris. State. App. B, p. 7b) Cf. *Trimble v. Gordon*, _____ U.S. _____, 97 S.Ct. 1459 (decided April 26, 1977).

II

TITLE 18 §302 OF THE DISTRICT OF COLUMBIA CODE IS UNCONSTITUTIONAL UNDER THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE CONSTITUTION.

The first clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion * * *." In *Walz v. Tax Commission* (1970), 397 U.S. 664, 669, the Court stated:

> " * * * the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.
>
> "Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so. * * * "

In order to be valid under the Establishment Clause, a statute must meet the test set forth in the case of *Committee for Public Education v. Nyquist* (1973), 413 U.S. 756, 772-773. There it is stated that the three-part

test that has emerged from the Court's decision is that the law in question, first, must reflect a clear secular legislative purpose; second, must have a primary effect that neither advances or inhibits religion; and, third, must avoid excessive governmental entanglement with religion. Applying the foregoing principles and test to the statute in question condemns it is an unconstitutional infringement of religious freedom. It is fundamental that organized religion cannot function without the availability of donations and gifts from its supporters. Accordingly, anything that infringes on the right of religious organizations to receive or the right of the individual to give has a direct effect on religion's very existence. A statute which denies the bequest to the religious legatees in this case is direct governmental interference with religion. The protection afforded by the First Amendment includes the right of religion to financial support. *Cantwell v. Connecticut, supra; Jamison v. Texas, supra.* "It is plain that a religious organization needs funds to remain a going concern." *Murdock v. Pennsylvania* (1943), 319 U.S. 105, 111. Donations and bequests are the lifeblood of organized religion, and any statute or law which alters or stops the flow of such gifts to religious organizations to any extent has the primary effect of inhibiting religion.

As found by the Court below, the purpose of the statute is to preclude "deathbed" gifts to clergymen and religious organizations by persons who might be unduly influenced by religious considerations. See: Cong. Globe, 39th Congress, 1st Session, 3970-71 (1866) (Juris State. App. A, p. 3a) See *Abington School District v. Schempp* (1963), 374 U.S. 203, 222, where it is said:

> "* * *The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. * * * "

The legislative purpose of the statute here in question has the primary and principal effect of inhibiting religion. Consequently, the statute violates the Establishment Clause of the First Amendment to the Constitution. See: *Lemon v. Kurtzman* (1971), 403 U.S. 602.

The appellants argue (Br. p. 7) that the statute has a secular purpose and deals with a secular activity. First, assuming the secular purpose of the statute is to prohibit "deathbed" bequests to religious organizations, this does not help appellants. Where First Amendment rights are involved, in order to sustain the validity of the statute it is necessary to show some compelling state need for the enactment. *Sherbert v. Verner, supra.* Secondly, appellants' assertion that the statute deals with a secular activity overlooks the conflict between First Amendment rights and the right of the Congress to legislate regarding the right or privilege of a person to make a will. Where this conflict occurs, First Amendment rights are paramount and must prevail unless there is some compelling governmental interest that justifies the infringement of the First Amendment rights. As pointed out above, the purported evil of the "deathbed" influence is not a sufficient reason for the infringement of First Amendment rights.

The appellants argue (Br. p. 7) that the statute does not deny support to religious organizations and further that only a very limited group of gifts are eliminated. This argument overlooks the fact that the primary and

principal effect of the statute is to take away from religion *all* bequests made within the 30-day prohibited period. Further, when First Amendment rights are involved, it is the *nature* of the rights that are infringed and not the *degree*. Cf. *Board of Regents v. Roth* (1972), 408 U.S. 564, 570-571; *Goss v. Lopez* (1975), 419 U.S. 565, 575.

Appellants (Br. p. 7) argue that over 100 years of the statute have not resulted in the establishment or de-establishment (sic) of church or religion. In *Committee for Public Education v. Nyquist*, supra, the Court points out:

> "But historical acceptance without more would not alone have sufficed, as 'no one acquires a vested or protected right in violation of the Constitution by long use.' * * *" Id at 792.

Appellants rely on the decision in *Braunfeld v. Brown* (1961), 366 U.S. 599, which upheld a state Sunday closing law on the grounds that it had the secular purpose of setting aside a uniform day of rest for all citizens. This case is readily distinguishable from the instant case for the same reasons it was distinguished in *Sherbert v. Verner, supra*, i.e., "a strong state interest in providing one uniform day of rest for all workers. That secular objective could be achieved, the Court found, only be declaring Sunday to be that day of rest." In addition, in this case the discriminatory nature of the statute which singles out religious bequests for particular treatment makes it clear that the statute had other than a secular purpose.

Appellants (Br. p. 8) contend that the states possess extensive powers to establish rules of inheritance and that the Tenth Amendment reserves to the States the power to determine the manner of testamentary dispositions

[citing *Labine v. Vincent* (1971), 401 U.S. 532; and *United States v. Burnison* (1950), 339 U.S. 87]. Under this theory, a state could enact a statute making it illegal for persons of certain races to inherit property. Obviously, any powers reserved to the states under the Tenth Amendment are exercisable subject to paramount rights guaranteed to all citizens by the first nine Amendments. Appellants assert that "The disposition of property by will is governed solely by state statute."[4] However, having permitted legacies and devises generally, a state legislature may not thereafter restrict them in an unconstitutional manner. Cf. *Goss v. Lopez, supra*. In *Sherbert v. Verner, supra*, it was stated:

> " * * *It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. * * *" Id at 404.

Appellants conclude their argument against First Amendment rights (Br., p. 8) by pointing out that a spouse's renunciation of a bequest under Title 19 §113 could have a similar effect on bequests to religious organizations. This argument misses the point. A spouse's renuciation would affect all legatees alike, whether individuals, charitable, religious or otherwise. It does not single out religion for particular treatment.

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[4] This statement is subject to the holding of the Court in *Trimble v. Gordon, supra*, and particularly footnote 12 which in part states: "* * * Although the proposition is self-evident, *Reed v. Reed*, 404 U.S. 71 (1971), demonstrates that state statutes involving the disposition of property at death are not immunized from equal protection scrutiny. * * *"

III

THE COURTS BELOW CORRECTLY HELD THAT TITLE 18 §302 OF THE DISTRICT OF COLUMBIA CODE IS INVALID AS CONSTITUTING A DEPRIVATION OF DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION.

The Court of Appeals and the Superior Court of the District of Columbia held that Title 18 §302 of the District of Columbia Code was unconstitutional under the Fifth Amendment. The courts below both found that the statute created an impermissible classification. It created two classes of beneficiaries, one class composed of clergymen and religious institutions and the second encompassing all other beneficiaries. The trial court determined that there is neither a compelling state interest or rational grounds justifying the statutory classification. The Court of Appeals concluded that the discriminatory treatment was invalid even under the "rational basis test." (Juris. State. App. A, p. 9a, footnote 9) Nothing set forth in appellants' brief requires a reversal of the holding of the courts below.

Appellants (Br., p. 9) correctly recognize that under *Bolling v. Sharpe* (1954), 347 U.S. 497, the equal protection clause of the Fourteenth Amendment is made applicable to the District of Columbia by the due process clause of the Fifth Amendment so that unjustifiable discrimination is prohibited by the due process clause. In *Bolling*, the Court found that racially segregated public schools in the District of Columbia violated the due process clause and stated:

> "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect. * * * " Id at 499

Similarly, classifications based on religion are equally contrary to tradition and must be scrutinized with particular care. The classification here involved affects First Amendment rights which have traditionally been regarded as in a preferred position. *Murdock v. Pennsylvania, supra; West Virginia State Board of Education v. Barnette, supra; Follett v. McCormick* (1944), 321 U.S. 573. As pointed out above (p. 6) while governments have inherent police power to regulate religious activities in a reasonable and nondiscriminatory manner,[5] it is only constitutionally permissible to do so if a compelling state interest requires the regulation. *Sherbert v. Verner, supra; West Virginia State Board of Education v. Barnette, supra; NAACP v. Button* (1963), 371 U.S. 415, 438; *Bates v. Little Rock* (1960), 361 U.S. 516.

The trial court determined that there was no compelling state interest which justified the infringement of First Amendment rights. The Court further pointed out that even assuming the purpose of the statute was to prevent the clergy and religious organizations from using undue influence on a testator nearing death, the state's interest could be served by creating a rebuttable presumption of undue influence with respect to a religious entity, which would alleviate the problem without infringing First Amendment rights. *Sherbert v. Verner, supra.* The trial court further found that there was not even a rational basis for the classification set forth in the statute. The Court of Appeals also determined that the classification of the statute had no rational relationship to the purpose of the statute and hence

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5 "* * * The conduct or action so regulated have invariably posed some *substantial* threat to public safety, peace or order." *Sherbert v. Verner, supra,* p. 403 (emphasis added).

denies religious legatees equal protection of the law. Having determined that the statute failed to meet the "rational basis" test, the court found it unnecessary to determine whether the classification affects fundamental rights which would require a showing of a compelling state interest. (Juris. State. App. A, p. 9a, footnote 9)

The statute in declaring bequests to religious organizations invalid under the same circumstances in which bequests to all other legatees, including charitable, education - al and other secular organizations, are permitted is an arbitrary classification and has a real, appreciable and detrimental effect on the free exercise of religion. Appellants' claim (Br., pp. 7, 9) that the statute has a very limited and indirect effect on religion and therefore does not regulate a fundamental interest protected by the First Amendment is beside the point. This Court has pointed out that in determining "whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." *Board of Regents v. Roth, supra; Goss v. Lopez, supra.* Religious organizations, like business organizations and secular and charitable and educational organizations, need money and property to carry on their work. Religion relies solely on contributions and gifts. To prohibit the receipt of the bequests in thie case and thus deny the churches financial support is a violation of First Amendment rights. *Cantwell v. Connecticut, supra; Jamison v. Texas, supra; Murdock v. Pennsylvania, supra.* Infringement of constitutional guarantees is not a matter of degree. As the Court has stated in other circumstances[6] what "is today a trickling stream may all to soon become a raging torrent and, in

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[6] *Abington School District v. Schempp* (1963), 374 U.S. 203, 225.

the words of Madison, 'it is proper to take alarm at the first experiment on our liberties. ' * * * * " It would be difficult to conceive of a statute which has a more direct, real and appreciable effect respecting an establishment of religion or prohibiting the free exercise thereof than one proscribing devises or bequests to religious organizations.

The Court of Appeals pointed out that the issue in this case was considered by the Supreme Court of Pennsylvania with respect to the Pennsylvania Mortmain statute in *In re Estate of Cavill* (1974), 459 Pa. 411, 329 A.2d 503; and *In re Estate of Riley* (1974), 459 Pa. 428, 329 A.2d 511. The Pennsylvania statute invalidated *all* charitable gifts made within 30 days of the testator's death, unless those who would benefit by the invalidity agreed to the gift. The Supreme Court of Pennsylvania held the statute invalid as a denial of equal protection of the laws to the charitable beneficiaries. In the instant case, the Court of Appeals approved the reasoning of the Pennsylvania Court but found the District of Columbia statute to be perhaps more arbitrary than the Pennsylvania statute because it singled out religious devises and bequests, not all charitable bequests, and further it distinguishes between bequests to religious institutions and bequests to charitable organizations owned and operated by religious institutions, making only the bequests to religious institutions invalid. The purpose of the statutes, both the District of Columbia and Pennsylvania, is to protect the family of a testator who was unduly influenced by religious considerations. The *Cavill* opinion shows that the statute nullified bequests to charities even where the testator leaves no immediate family and would operate to benefit only distant relatives. The Court found this protection of a nonexistent "family" defeated the testator's express intent without any relation to the purpose which is sought to be promoted, "further demonstra-

ting the irrationality of the statutory classification." The District statute would not only nullify the testator's expressed intent and benefit distant relatives with whom testator may have had little contact during his life but would escheat to the District of Columbia if the testator had no living heirs. See Title 19 §701, D.C. Code. The Pennsylvania statute would presumably allow the bequests to be made to charitable organizations in the event that no next of kin were available to consent or object.

Appellants argue (Br., p. 9) that the D.C. statute regulates a secular activity, the testamentary transfer of property, and state that the statute is part of a greater body of legislation which prescribes various conditions which must be met in order for a testamentary disposition to be valid. Assuming that this is true, it does not support appellants' cause. The constitutional point is that secular legislation must not infringe on the guarantees provided for by the First Amendment. Here the statute denies to churches the fundamental right to receive a bequest while permitting all other legatees similarly circumstanced the right to bequests. This denies the religious legatees equal protection of the laws. *Trimble v. Gordon*, ____U.S.____, 97 S.Ct. 1459 (decided April 26, 1977). This refutes appellants' assertions (Br., pp. 10, 11) that the statute does not regulate a fundamental interest protected by the First Amendment or that the statute constitutes no direct or substantial infringement of a fundamental constitutional right.

Appellants (Br., pp. 11-13) seem to argue that the "strict scrutiny" test is not applicable in this case because Title 18 §302 is in the nature of an economic regulation which states are accorded wide latitude in enacting. Appellants premise this argument on the assertion (Br., p. 11) that the D.C. statute "constitutes no direct or substantial infringement of a fundamental constitutional right." This is the issue in the case. The courts below found that the statute did infringe fundamental constitutional rights. The cases[7] relied on by appellants support appellees' position. The quotation by appellants (Br., p. 12) from the case of *City of New Orleans v. Dukes* (1967), 427 U.S. 297, states, in part, " • • • Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, *religion*, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged by rationally related to a legitmate state interest. • • • " (Emphasis added) This quotation makes it clear that religion is a fundamental constitutional right and that no showing merely of a rational relationship to some colorable state interest is sufficient when First Amendment or fundamental constitutional rights are involved. *Cantwell v. Connecticut, supra; Sherbert v. Verner, supra;* see: *Police Department v. Mosely* (1972), 408 U.S. 92, 98-99.

Appellants (Br., pp. 13-14) argue that since the statute expresses a proscription, there is no denial of religious beneficiaries' right to be heard because they had no such right. Cited in support of this statement is *Board of Regents v. Roth, supra*. In that case, a nontenured college professor had been hired for a fixed term of one year. He was advised that he would not be rehired the next year but no

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[7] *Shapiro v. Thompson* (1969), 394 U.S. 618; *Dunn v. Blumstein* (1972), 405 U.S. 330; *Bullock v. Carter* (1972), 405 U.S. 134; *Frontiero v. Richardson* (1973), 411 U.S. 677; *San Antonio School District v. Rodriguez* (1973), 411 U.S. 1; *Johnson v. Robison* (1974), 415 U.S. 361; *City of New Orleans v. Dukes* (1976), 427 U.S. 297.

reasons were given. He brought suit alleging, among other things, the failure of the University to give him notice of any reasons for nonretention and an opportunity for a hearing violated his right to procedural due process. The Court held that he had no right to a statement of reasons or to a hearing on the decision not to rehire him. This is clearly distinguishable from the present case where a testatrix has made bequests to religious legatees and a statute which is constitutionally challenged denies them the right to the bequests. Unlike the factual situation in *Doremus v. Board of Education* (1952), 342 U.S. 429, this proceeding involves "a good-faith pocketbook action" and constitutes "a direct dollar-and-cents injury." To say that the religious legatees have no right to be heard or any of the other guarantees of procedural due process in the light of the facts in this case is tantamount to saying the religious legatees are not entitled to the protection of the First and Fifth Amendments to the Constitution.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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STATEMENT UNDER RULE 33(2) (b)

Since the proceeding draws into question the constitutionality of the Act of September 14, 1965, 79 Stat. 688, Pub. L. 89-183, §1, also known as Title 18 §302 of the District of Columbia Code, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. §2403 may be applicable.

I hereby certify that a copy of this Brief for Appellee Calvary Baptist Church was served by first-class mail, postage prepaid, the 3rd day of June, 1977, on the Solicitor General, Department of Justice, Washington, D.C. 20530.

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CALVARY BAPTIST CHURCH

APPENDIX

U.S. District Court

In Re: Small, Dist. Ct. D.C., Administration No. 2507-70, February 7, 1972. *Opinion* per Gesell, J. Joseph A. Rafferty for petitioner. Frank J. Delany for legatees.

GESELL, J.: The Court has before it a complaint for construction of the will of Madeleine B. Small, in which she left her estate in various parts to a series of Catholic religious institutions, and to various charitable institutions, including the Cancer Society, the Heart Association and the Montgomery County Society for Crippled Children.

She had no immediate next-of-kin or heirs-at-law. She had by prior will given substantial indication of her strongly-held religious inclinations. There is no evidence that any inappropriate influence was brought to bear upon her execution of her last will and testament; nor indeed is there any evidence before the Court that she even had any contact with the Catholic institutions to which she left her bequests.

The Executor, quite properly – whose final account would not have been approved until this matter was settled – has brought to the Court's attention the existence of Title 18, Section 302 of the D.C. Code, which provides with respect to devises or bequests for religious purposes as follows:

> "A devise or bequest of real or personal personal property to a minister, priest, rabbi, public teacher, or preacher of the gospel, as such, or to a religious sect, order, or denomination, or to or for the support, use or benefit thereof, or in trust therefor, is not valid unless it is made at least thirty days before the death of the testator."

This Will fell within the thirty-day period and, accordingly, the question presented for construction is whether the devises to admittedly religious sects and orders should be upheld or set aside; and if to be set aside, on what basis.

The statute just referred to is an anachronism peculiar to the District of Columbia which dates back to the early Nineteenth Century, at the time when the law with respect to the transfer of realty to church institutions was quite different and is in the nature of a Mortmain statute.

The Court is unable to find in the statute any justification which can withstand examination of the statute in the light of the First Amendment. Clearly the statute discriminates against religion. Many others would be in an equal position to influence a testator – lawyers, nurses, physicians, charitable organizations, and the like. The statute does not run to any such persons and, therefore, it cannot be said to be a statute which is designed to prohibit all bequests suggesting improper influence because made in the 30 days prior to execution of the will.

The difficulty with the statute, as the Court sees it, is that it singles out religion for particular treatment, without any justification. As counsel points out, if anything, religious institutions, where the Government interferes, are in a preferred position, but at least they should be in these circumstances in an equal position. I see no basis of compelling Government necessity or otherwise for the Government to interfere with religious practice, as the statute appears to do in its operation. The statute creates no mere presumption but creates an irrebuttable attack on the will which cannot, as the Court reads the statute, be ameliorated or modified by the facts and circumstances of any particular case: and as this case well illustrates, there are many

facts and circumstances that would operate against the statute if it were phrased in this instance merely as a presumption rather than an irrebuttable requirement.

Accordingly, the Court will direct that the will be constructed without regard to Title 18, Section 302, and that the bequests there made, if otherwise valid, should be carried out.

I am, of course, speaking only prospectively. I think it worth noting, however, that the courts of this jurisdiction have in a number of other cases sought by various types of judicial interpretation and perhaps almost legerde-main in a few cases to avoid the operation of the statute in spite of its express terms by attempting to identify the legatee as a charitable rather than purely religious donee. The First Amendment is now clearly defined in many cases, including cases brought to the Court's attention in the papers. The question of determining what acts of Government tend to interfere with religion falls well within what the courts have long been called on to do in this sensitive area and I think it is time this statute be identified for what it is and stricken.

[Court's oral ruling from the bench.]